

### **REMARKS**

Applicants thank Examiner Sullivan for continued review of the pending application. Applicants note that the Amendment After Final was *not* entered. Thus, with this response, claims 1 and 2 are currently amended, and claims 3-15 are new. Support for the amendments and new claims is found in, at least, PREPARATION EXAMPLE 1-5 and 13-16 and paragraphs [0007], [0009], [0017] and [0018] of the Patent Application Publication. No new matter is added.

For at least the following reasons, all claims are in condition for allowance. In view of the following arguments, all claims are in condition for allowance over the references of record. Therefore, this response is believed to be a complete response to the Office Action.<sup>1</sup> Further, for any instances in which the Examiner took Official Notice in the Office Action, Applicants expressly do not acquiesce to the taking of Official Notice, and respectfully requests that the Examiner provide an affidavit to support the Official Notice taken in the next Office Action, as required by 37 CFR 1.104(d)(2) and MPEP § 2144.03.

### **35 U.S.C. § 102(b) Rejections**

Claim 1 was rejected under 35 U.S.C. § 102(b) as being allegedly anticipated by Peterson, JR et al (2001/0044393). Applicants respectfully traverse this rejection.

To demonstrate anticipation under 35 U.S.C. §102, the Examiner must show that a single prior art document describes every element of the claimed invention. MPEP § 2131. The identical invention must be shown in as complete detail as is contained in the claim. The elements must be arranged as required by the claim. *Net Moneyin, Inc. v. Verisign, Inc.*, 545 F.3d 1359, 1369 (Fed. Cir. 2008). This means that the prior art reference must clearly and unequivocally disclose the

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<sup>1</sup> As Applicants' remarks and amendments with respect to the Examiner's rejections are sufficient to overcome these rejections, Applicants' silence as to assertions by the Examiner in the Office Action or certain requirements that may be applicable to such rejections (e.g., whether a reference constitutes prior art, motivation to combine references, assertions as to dependent claims, etc.) is not a concession by Applicants that such assertions are accurate or such requirements have been met, and Applicants reserve the rights to analyze and dispute such assertions/requirements in the future.

claimed invention “without *any* need for picking, choosing, and combining” various elements. *Id.* at 1371, *citing In re Arkey* 455 F.2d 586, 587 (CCPA 1972) (emphasis in original).

### **Amended Independent Claim 1**

Amended claim 1 recites “an insect- and plant pathogen-pesticide, which comprises, by weight, at least 49% of hydrogenated starch hydrolysate; and alkyl glucoside.” This amendment is supported because in PREPARATION EXAMPLES 1-5 and 13-16, the weight percentage of hydrogenated starch hydrolysate is at least 49%. Among these examples, the minimum weight percentage is set forth in Example 16. This is because there is a 0.7 solid concentration of hydrogenated starch hydrolysate, multiplied by 71.4%. This renders a 49% overall weight concentration of hydrogenated starch of the overall example.

The cited reference, Peterson, does not disclose this claimed combination in the level of detail as set forth in the claim, nor does Peterson clearly and unequivocally disclose the recitations of the claim without *any* need for picking, choosing, and combining. Instead, Peterson discloses only includes one example that includes hydrogenated starch hydrolysate. In Table 7, the hydrogenated starch hydrolysate is not specifically combined with “alkyl glucoside,” and the hydrogenated starch hydrolysate comprises *only 2.0% by weight* of the entire composition. [Peterson, Table 7]. Amended claim 1 requires the presence of about 25X more hydrogenated starch hydrolysate than is taught by the prior art. Additionally, “pesticides” and “insecticides” are recited in the body of the text, are classes of compounds that are regulated by the EPA, and are therefore not mere “fields of use” and as such must be considered for patentability purposes. For at least this reason, amended claim 1 and dependent claims 2 - 5 are not anticipated by Peterson.

### **New Independent Claim 6**

New independent claim 6 recites “a composition consisting essentially of an environmentally friendly insect- and plant pathogen-pesticide, which comprises an effective amount of hydrogenated starch hydrolysate for pesticidal activity.” In the Advisory Action, the Examiner asserted that the legal terminology “consisting essentially of” is new matter. Applicants traverse. The Applicants, through their specification, have conveyed that the key ingredients in the claimed compositions are “alkyl glucoside” and “hydrogenated starch hydrolysate.” [Patent Application

Publication [Abstract], paragraphs [0001][0007][0008][0020]]. The Applicants have also conveyed the importance of environmental friendliness. [Patent Application Publication [Abstract], paragraphs [0007][0018]. In the examples, the Applicants conveyed that the only other additional ingredients to be included are ingredients that do not materially affect the basic and novel characteristics of the claimed composition. The exemplified additional ingredients are dehydro sodium acetate, water, Pronal EX-300, D-Sorbit. The test examples show that these ingredients did not affect the basic and novel characteristics of the claimed composition. [Patent Application Publication [Tables 1-6]. Thus, the specification is sufficient to convey to skilled artisans that the inventors were, at the time of filing, in possession of a composition consisting essentially of an environmentally friendly insect- and plant pathogen-pesticide, which comprises an effective amount of hydrogenated starch hydrolysate for pesticidal activity. Thus, the legal terminology “consisting essentially of” is not new matter.

New independent claim 6 is patentable over Peterson. Peterson discloses a composition that *must include a cationic surfactant such as BAC*, a nonionic surfactant such as an alkyl polyglucoside, and a polyol such as hydrogenated starch hydrolysate. [Peterson [0011]]. The BAC / cationic surfactant is critical in Peterson because it provides the antimicrobial activity in the claimed antimicrobial liquid. [Peterson, title, Table 1]. The inclusion of the BAC in the Peterson composition provides an important distinction from pending claim 6 because claim 6 recites a transition phrase of “consisting essentially of.” This transition phrase *excludes* additional ingredients that materially affect the basic and novel characteristics of the claimed composition. MPEP 2111.03. Amended claim 5 requires that the pesticide be “environmentally friendly,” as described in paragraphs [0007] and [0018] of the Patent Application Publication. This means new claim 6 would exclude cationic surfactants such as BAC as ingredients, because the positively charged surfactants are generally understood to be harsh and not environmentally friendly to those of ordinary skill in the art. See, for example, Larson RJ et al., *Adsorption and biodegradation of cationic surfactants in laboratory and environmental systems*, Dev. Ind. Microbiol. 24 pp. 425-434 (1983). Peterson, by contrast, makes it clear that *all* Peterson combinations *must* include a positively charged surfactant, preferably BAC, in its rinse-off cleansing liquid. [Peterson [0014-

0017] Table 1, Table 7]. Thus, for at least this reason, new claim 6 and dependent claims 7 -9 are patentable over Peterson.

### **New Independent Claim 10**

New independent claim 10 is a method claim directed to killing insects and plant pathogens. Peterson does not teach or suggest any such method. Indeed, the polyol of Peterson, which may include hydrogenated starch hydrolysate, serves the purpose of *conditioning skin*. In the Peterson compositions, the cationic surfactant BAC was reported to be active against *Staphylococcus aureus*, *Escherichia coli* and *Staphylococcus marcescens*. [Peterson [0024]]. In other words, the Peterson compositions were rinse-off liquids used in methods of cleaning surfaces such as human skin. [Peterson [Title]][0024]]. From the teachings of Peterson, it is not obvious to apply a composition comprising hydrogenated starch hydrolysate and alkyl glucoside to a plant to kill insects or plant pathogens. Thus, independent claim 10 and dependent claims 11-15 are patentable for at least this reason.

### **CONCLUSION**

Applicants believe any fee due has been addressed in the accompanying transmittal, however, if any additional fee is due, please charge our Deposit Account No. 18-0013, under Order No. OTA-0007 from which the undersigned is authorized to draw. To the extent necessary, a petition for extension of time under 37 C.F.R. § 1.136 is hereby made, the fee for which should be charged to such deposit account number.

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Respectfully submitted,

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